INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Borax Consolidated Ltd. v. *Los Angeles*, 296 U. S. 10	9
Dubuque & Pacific R. Co. v. *Litchfield*, 23 How. 66	9
Louisiana Ry. & Nav. Co. v. *New Orleans*, 235 U. S. 164	9
Oakland v. *United States*, 124 F. (2d) 959, certiorari denied, 316 U. S. 679	7
Oklahoma v. *Guy F. Atkinson Company*, 313 U. S. 508	8
Old Dominion Co. v. *United States*, 269 U. S. 55	7
State ex rel. Galen v. *District Court*, 42 Mont. 105	5, 6, 8
United States v. *243.22 Acres of Land*, 129 F. (2d) 678, certiorari denied *sub nom. Lambert* v. *United States*, 317 U. S. 698	7, 8
United States v. *2715.98 Acres of Land, More or Less*, 44F. Supp. 683	9
United States v. *2902 Acres of Land, More or Less*, 11 Law Week 2750, decided April 9, 1943	9
United States v. *Forty Acres, More or Less of Land, Etc.*, 24 F. Supp. 390	10
United States v. *Stevenson*, 215 U. S. 190	9
Water Co. v. *Knoxville*, 200 U. S. 22	9
Statutes:	
Act of March 3, 1875, sec. 14, 18 Stat. 474	10
Act of August 1, 1888, 25 Stat. 357 (40 U. S. C. sec. 257)	6, 11
Act of February 22, 1889, 25 Stat. 676 (Montana Enabling Act):	
sec. 10	4, 13
sec. 11 and as amended by Act of May 7, 1932, 47 Stat. 150	4, 9, 10, 13
Act of July 3, 1890, sec. 5, 26 Stat. 215	10
Act of July 10, 1890, sec. 5, 26 Stat. 222	10
Act of June 20, 1910, sec. 10, 36 Stat. 557	10
Act of June 16, 1933, Title II, 48 Stat. 200 (National Industrial Recovery Act):	
sec. 202	6, 11
sec. 203	7, 12
Emergency Relief Appropriation Act of 1935, 49 Stat. 115	6

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1025

STATE OF MONTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 76–81) is reported in 134 F. (2d) 194.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered March 6, 1943 (R. 81–82). The petition for a writ of certiorari was filed May 13, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether lands granted by the United States to a state to be used for school purposes and not to be disposed of except at public sale are subject, under the general condemnation Act of August 1, 1888, and Title II of the National Industrial Recovery Act of June 16, 1933, to condemnation by the United States for prevention of soil erosion, relief of unemployment, and protection of migratory waterfowl and other forms of wildlife.

STATUTES INVOLVED

Section 1 of the Act of August 1, 1888, 25 Stat. 357 (40 U. S. C. sec. 257); Sections 202 and 203 of Title II of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200; and Sections 10 and 11 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, so far as pertinent, are set out in the Appendix, *infra,* pp. 11–14.

STATEMENT

The judgment sought to be reviewed (R. 81–82) reversed a judgment of the district court (R. 58–59) dismissing the petition filed by the United States to condemn certain land owned by the State of Montana. The material facts are not disputed and may be summarized as follows:

The United States on January 19, 1938, filed its complaint in condemnation in the federal district court to acquire 3601.51 acres of land which were owned by the State of Montana (R. 3–22).

The complaint alleged that the land was needed in connection with the Red Rock Project, one of the undertakings included in the Land Use Program of the Federal Emergency Relief Administration (R. 4).[1] The purposes of this project were stated to be (R. 4–5):

> Prevention of soil erosion; sanctuary for the propagation and protection of migratory waterfowl by providing nesting, resting, and feeding grounds in effectuation of the treaty between the United States and Great Britain, August 16, 1916 (39 Stat. 1702); refuge for other forms of wild life common to this area; and relief of unemployment by the construction of improvements and developmental work necessary for the use of the land in the manner herein described.

The complaint alleged that by written options the State of Montana agreed to sell the lands in question to the United States and that the options were exercised by the Administrator of the Resettlement Administration, to whom had been transferred the powers and duties of the Federal Emergency Relief Administrator with respect to this project (R. 5–8). The options provided that title could be acquired by judicial procedure (R. 6–7). The complaint then set forth that the Ad-

[1] At the time of the filing of this complaint, the Government had already acquired 15,801 acres of privately owned land for the Red Rock Project at a cost of $285,000, and this proceeding was instituted to acquire interspersed land owned by the State of Montana.

ministrator had determined that it was necessary and advantageous that the United States acquire title in fee simple to the described lands by condemnation proceedings (R. 8–9), and judgment was asked condemning the land and awarding just compensation to those entitled (R. 18–20).

The State of Montana answered the complaint, admitting that the options were executed but denying their validity (R. 25), denying that the use to which the lands were to be applied was a public use (R. 26), and alleging that the lands sought to be condemned were "school lands" and could not be disposed of except at public sale (R. 29–31).[2]

A declaration of taking[3] was subsequently filed by the United States, $18,327.55 was deposited as estimated compensation in order to acquire the immediate use of and title to the land here involved (R. 35–44), and a motion for judgment on the declaration of taking was filed

---

[2] Upon her admission into the Union, sections numbered sixteen and thirty-six, or other lands equivalent thereto, were granted to Montana "for the support of common schools." Act of February 22, 1889, sec. 10, 25 Stat. 676, 679. The involved lands fall in this classification (R. 9–11). By the terms of the grant those lands were to "be disposed of only at public sale" and in accordance with other prescribed conditions. Act of February 22, 1889, sec. 11, 25 Stat. 676, 679–680, and amendatory Act of May 7, 1932, 47 Stat. 150. The relevant parts of these statutes appear in the Appendix, *infra*, pp. 12–14.

[3] The purposes of the acquisition as stated in the complaint were repeated in the declaration of taking.

(R. 50). The state resisted this motion on the following grounds (R. 52–53):

> 1. That the Supreme Court [of the United States] alone has jurisdiction of condemnation proceedings brought to acquire state-owned lands.
>
> 2. That the lands here involved being school lands are not subject to condemnation.
>
> 3. That the lands involved are not being acquired for a public use.
>
> 4. That it is not necessary that these lands be taken.
>
> 5. That the State has not consented to the acquisition of these lands for the purposes stated in the complaint.

The district court was of the opinion that on the present state of the record only the first and second contentions could be finally disposed of (R. 56). It held the first contention not well-founded but sustained the second, being of the opinion that "school lands" could not be disposed of except in accordance with the Montana Enabling Act (Appendix, *infra,* pp. 12–14), which prohibited the state from disposing of such lands except at public sale after advertising (R. 56–57). As supporting authority it relied on the case of *State ex rel. Galen* v. *District Court,* 42 Mont. 105 (1910). It accordingly dismissed the action (R. 58–59).

The United States appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 61), which reversed the judgment of the district court, hold-

ing that since the Montana Enabling Act did not "clearly and specifically prohibit the United States from condemning the lands, we should not extend the prohibition to the United States" (R. 79). It held inapplicable the decision in *State ex rel. Galen* v. *District Court,* 42 Mont. 105 (1910), since it was not there decided that the Montana Enabling Act prevented the United States from condemning "school lands" R. 77, 79).

ARGUMENT

1. Petitioner contends that the circuit court of appeals should have held that since the authority for the instant condemnation was "the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and the Act of August 1, 1888 (25 Stat. 357), state owned school lands could not be acquired by the federal government without the consent of the State" (Pet. 13). As a basis for this argument, petitioner asserts that the Act of August 1, 1888, 25 Stat. 357 (Appendix, *infra,* p. 11), "vests no authority in any executive office" to condemn real estate, but only established a method for condemnation where authority was given, and that the National Industrial Recovery Act did not authorize condemnation of the instant project, the sole purpose of which it characterizes as providing a sanctuary for propagation and protection of migratory waterfowl (Pet. 13–14).

The contention is unsound. Section 202 of Title II of the National Industrial Recovery Act of

June 16, 1933, 48 Stat. 200 (Appendix, *infra*, pp. 11–12), provided that a comprehensive program of public works was to be prepared which should include, among other things:

> (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public * * *.

Section 203 of the same Act (Appendix, *infra*, p. 12) authorized the construction or financing of such projects to remedy unemployment and the acquisition by purchase or the exercise of the power of eminent domain of property needed for any such project.

As the circuit court of appeals pointed out (R. 80), the lands are being taken for at least three purposes: (1) prevention of soil erosion; (2) propagation and protection of migratory wildlife; and (3) relief of unemployment (R. 4–5, 37). Agreement with petitioner's contention would, as a minimum, necessitate finding that the purposes were not as stated by the Administrator (see Statement, *supra*, p. 3). This the courts will not do. *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *Oakland* v. *United States*, 124 F. (2d) 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *243.22 Acres of Land*, 129 F.

(2d) 678, 683 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698. The Administrator having authority to condemn, the mere fact that lands are owned by a state does not prevent their acquisition by the United States. *Oklahoma* v. *Guy F. Atkinson Company,* 313 U. S. 508, 534.

2. Petitioner further urges (Pet. 15–16) that the circuit court of appeals is bound by the decision of the Montana Supreme Court in *State ex rel. Galen* v. *District Court,* 42 Mont. 105 (1910), stating that case to hold that state-owned school lands are not subject to condemnation. However, as is pointed out by the circuit court of appeals (R. 77–79), the state court in that case did not decide that the Montana Enabling Act prevented the condemnation of school lands by the *United States.* It held that such lands could not be acquired by condemnation by persons seeking to construct a dam for the purpose of generating electricity for general sale. The Montana court in arriving at its conclusion reasoned that the *state* had agreed not to dispose of the land granted to it by the United States except in the manner prescribed in the grant. There is no holding, or even an intimation, that the federal Government, by the language of the Montana Enabling Act, placed a limitation upon itself in the exercise of any of its sovereign powers with respect to such lands.

Even if the point had been decided, however, the decision would not be binding on the federal courts, for those courts are not bound by state decisions interpreting the meaning and effect of a federal grant contained in a federal statute. *Borax Consolidated Ltd.* v. *Los Angeles,* 296 U. S. 10, 22. And, since the language used in the Montana Enabling Act[4] does not clearly and specifically prohibit the United States from condemning the lands, it should not be implied that the United States relinquished its sovereign power to exercise the right of eminent domain as to these lands. *Dubuque & Pacific R. Co.* v. *Litchfield,* 23 How. 66, 88; *Water Co.* v. *Knoxville,* 200 U. S. 22, 33; *United States* v. *Stevenson,* 215 U. S. 190, 197; *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 175.

In every instance where the question has been passed upon, in states with similar Enabling Acts, the courts are in accord that the restriction there imposed has application only to a disposal by the state to private individuals, and that by these statutes the United States placed no limitation upon itself in the exercise of any of its sovereign powers with respect to such lands. *United States* v. *2715.98 Acres of Land, More or Less,* 44 F. Supp. 683, 684 (W. D. Wash.); *United States* v. *2902 Acres of Land, More or Less,* 11 Law Week

[4] "That all lands granted by this Act shall be disposed of only at public sale after advertising" (sec. 11, Appendix, *infra*, p. 13).

2750 (Wyo.), decided April 9, 1943. See *United States* v. *Forty Acres, More or Less, of Land, Etc.*, 24 F. Supp. 390 (Idaho).

Identical or substantially identical provisions relating to the disposal of school-land grants are to be found in the Enabling Acts of Arizona, Colorado, Idaho, New Mexico, North and South Dakota, Washington, and Wyoming.[5] To construe these provisions as precluding the acquisition of state school lands by federal condemnation proceedings would make it impossible for the United States to acquire large blocks of land which it needs for bombing ranges and other war purposes.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
VERNON L. WILKINSON,
DWIGHT D. DOTY,
Attorneys.

MAY 1943.

[5] Act of March 3, 1875, sec. 14, 18 Stat. 474; Act of February 22, 1889, sec. 11, 25 Stat. 676; Act of July 3, 1890, sec. 5, 26 Stat. 215; Act of July 10, 1890, sec. 5, 26 Stat. 222; Act of June 20, 1910, sec. 10, 36 Stat. 557.